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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 891

FIRST NATIONAL BANK OF ELWOOD,
Petitioner,

vs.

RICHARD E. BIXBY, AS TRUSTEE IN BANKRUPTCY OF CECIL L. SLAVENS, BANKRUPT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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FIRST NATIONAL BANK OF ELWOOD,
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RICHARD E. BIXBY, AS TRUSTEE IN BANKRUPTCY OF CECIL L. SLAVENS, BANKRUPT,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on December 10, 1957.

REFERENCE TO OPINIONS BELOW.

The findings of fact, conclusions of law and judgment of the District Court (App. R.[1] 16-31), are unreported

1. Herein "App. R." is used as the abbreviation for Appendix Record found in the certified copy of the Brief and Appendix for Plaintiff-Appellant, consisting of 34 pages of Appendix, 13 pages of Opinion of the Circuit Court of Appeals (pp. 26-37), judgment of the Circuit Court of Appeals (p. 38), order of the Circuit Court of Appeals on Petition for Rehearing (p. 39) and Certificate (p. 40).

and are printed in Appendix C hereto, *infra*, pp. 26-31. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra*, pp. 11-22, is reported in 260 F. 2d 712.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on December 10, 1957 (App. B, 23) and is printed in Appendix B hereto, *infra*, pp. 24-25. Rehearing was denied on January 8, 1958. (App. B, 23.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Whether the four months' preferential transfer period is to be calculated from the date of filing an amended involuntary petition in bankruptcy rather than from the date of filing the original petition which failed to specifically allege any act of bankruptcy and was found to be deficient.

STATUTES INVOLVED.

The statutory provision directly involved is Section 60(a)(1) of the Bankruptcy Act, 64 Stat. 23, 11 U. S. C., § 96:

> "§ 60. Preferred Creditors. a. (1) A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

The statutory provisions which are involved only in the sense that they may be interpretive of Section 60(a)(1) of the Bankruptcy Act are Section 1(13) of the Bankruptcy

Act, 66 Stat. 420, 11 U. S. C., § 1(15); Section 3(b) of the Bankruptcy Act, 66 Stat. 420, 11 U. S. C., § 21(b); Section 70(a) of the Bankruptcy Act, 66 Stat. 429, 11 U. S. C., § 110(a); General Orders in Bankruptcy, Nos. 37 and 38 (and Official Form No. 5 annexed), 11 U. S. C. following § 53, 30 Stat. 554; and Rule 16(c) of the Federal Rules of Civil Procedure, 28 U. S. C., Rule 15(c). They are printed in Appendix D, *infra*, pp. 32-33.

STATEMENT OF THE CASE

An involuntary petition in bankruptcy was filed against Cecil L. Stevens on April 19, 1954. (App. R. 7.) It contained allegations in the general language of the statute without any specification of facts. The key allegations were in the following form:

> "7(a) Within four months next preceding the filing of this Petition, the said Cecil L. Stevens committed an act of bankruptcy, in that he transferred, while insolvent, portions of his property to one or more creditors, with intent to prefer such creditors over his other creditors.
>
> (b) That within four months next preceding the filing of this Petition, the said Cecil L. Stevens concealed, removed, or permitted to be concealed or removed, a part of his property, with intent to hinder, delay or defraud his creditors or any of them, or made or suffered a transfer of part of his property, which transfer was fraudulent under the provisions of Sections 67 or 70 of the Bankruptcy Act."

The alleged bankrupt filed a motion to dismiss the petition on April 29, 1954. (Def. App.[2] R. 1.) Thereafter, the referee sustained the motion to dismiss on the ground that the petition was defective in not specifically setting forth the acts of bankruptcy alleged, but he granted the petitioning creditors leave to file and serve an amended petition on or before June 6, 1954. (App. R. 9-10.) On June 3, 1954 an

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2. Herein "Def. App. R." is used as the abbreviation for Appendix Record found in the certified copy of the Brief and Appendix for Defendant-Appellee consisting of 4 pages of Appendix and a Certificate (p. 5).

amended petition was filed. (Reply App.[2] R. 1-6.) No order dismissing the original petition was ever entered. On October 28, 1964, [illegible] adjudicated a bankrupt. (App. R. 16.) All [illegible] from the filing of the original petition through [illegible] continued under the same caption [illegible] in the bankruptcy court.

Subsequently, the trustee in bankruptcy commenced an action in the District Court against the defendant bank to recover [illegible] preferential transfers in the sum of [illegible] made during the period of January 25, 1964 to April 28, 1964. (App. R. 1-6.) The jurisdiction of the District Court was based on Section 60 (b) of the Bankruptcy Act, 11 U. S. C. § 96. On the defendant bank's motion, the District Court granted partial summary judgment for the defendant, holding that only such preferential transfers were made [illegible] within four months prior to the date of filing the amended petition, namely, those [illegible] the trustee. (App. R. 13-15.) A trial was held on the alleged preferential transfers made within four months of the amended petition, and judgment was entered against the defendant bank in the sum of [illegible] (App. R. 17.)

Upon appeal by the trustee, the court below reversed the judgment of the District Court, with Parkinson, Circuit Judge, dissenting. A majority of the court held that the amended petition did not state a new cause of action and, hence, related back to the date of the filing of the original petition, and that all preferences granted within four months prior to the filing of the original petition were avoidable.

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2. Herein "Reply App. R." is used as the abbreviation for Appendix Record found in the certified copy of the Reply Brief and Appendix for Plaintiff-Appellant consisting of 6 pages and a Certificate (p. 7).

REASONS FOR GRANTING THE WRIT.

1. The decision of the court below, which is presently upon the

Security and Exchange cases, the amended petition was not [illegible]. Nevertheless, the issue of whether the amended petition in such cases of action was the cause in all [illegible] was the basic issue of [illegible] was raised by a petition [illegible] to recover alleged preferences [illegible] more than four months before the [illegible] petition.

The question presented is of importance to the [illegible] under the Bankruptcy laws. Unless [illegible] some assurance of certainty as [illegible] with respect to the time within which [illegible] must be started in the [illegible] petitions [illegible] questions concerning the [illegible] will be settled, not only [illegible] but also over the objection of the [illegible] petitioner, the date for determining whether an act of bankruptcy has been committed within the four months [illegible] prescribed by Section 3(b) of the Bankruptcy Act. (Appendix D, *infra*, p. 32.)

The holding in the instant case will lead unscrupulous [illegible] creditors who might be inclined to file friendly bankruptcy petitions. No knowledge on [illegible] will be necessary. If objected to, the original petition will be treated with the vitality of [illegible] and the [illegible] in an amended petition filed months later. The debtor's relations with his creditors will be greatly jeopardized.

Creditors who deal with a debtor who is in financial difficulty will no longer have their interest as [illegible] protected under the Bankruptcy Act after a [illegible] period elapses. Thus other creditors can toll the running of the four months' period by filing an involuntary bankruptcy petition in which any or all of the six acts of bankruptcy are alleged merely in the general language of the

statute. Then, if objection is made to the defective original petition, the petitioning creditors can subsequently file an amended petition. If by that time specific facts have come to light, such facts by amendment can be fitted into any one of the general acts of bankruptcy alleged in the original petition, and under authority of the instant case the amended petition will relate back to the original petition. The effect of such decision, contrary to the intention of the Bankruptcy Act, will be destructive of rights intended to be preserved by the four months' limitation.

Another effect of the decision of the court below, as pointed out by Judge Parkinson, in his dissenting opinion (Appendix A, *infra*, p. 21), is to permit petitioning creditors to completely ignore the mandate of General Order in Bankruptcy No. 38. (Appendix D, *infra*, pp. 32-33.)

3. The decision of the court below is believed to be erroneous and the conflicting decisions of the Second Circuit Court of Appeals in *Dworsky* v. *Alanjay Bias Binding Corporation*, *supra*, and the Eighth Circuit Court of Appeals in *Hovland* v. *Farmer's State Bank*, *supra*, correct.

The test to be applied in determining whether an amended petition should relate back is stated in the *Dworsky* case, at 182 F. 2d 805:

> "Instead, we look only to the petition and proposed amendment to determine whether, when considered together, they disclose on their face that in the original petition the creditor set forth, or attempted to set forth, the same preferential transfer or transfers ultimately relied upon."

Although the court below in the instant case did not repudiate this test, it did reach a conflicting result.

Prior to the decision in the instant case, something more than allegations of acts of bankruptcy merely in the words of the statute has been required in order for there to be

a relation back. *Glint Factors* v. *Schnapp*, 126 F. 2d 207 (2nd Cir. 1942). This view took into consideration the liberal construction to be given Rule 15(c) of the Federal Rules of Civil Procedure (Appendix D, *infra*, p. 33) but recognized a point beyond which that liberality should not be extended.

In the instant case, the jurisdiction of the court is not an issue. The law is clear that a defective petition of the type here filed is sufficient to support jurisdiction, but the petition is subject to dismissal if timely objection is taken. The defect may be waived by answer or by going to trial. *Bradley* v. *Huntington*, 227 Fed. 948 (2nd Cir. 1921); *In re Middle West Utilities Co.*, 70 F. 2d 825 (7th Cir. 1934). In the instant case, however, the defect was not waived by the alleged bankrupt who filed a motion to dismiss the original petition and had his motion to dismiss sustained. The fact that the court below had the power to permit an amended petition to be filed does not foreclose consideration of the issue of whether the amended petition related back to the original petition.

Judge Parkinson, in his dissenting opinion (Appendix A, *infra*, p. 21), distinguished the case of *Harney Shoes, Inc.* v. *National Fabric & Finishing Co.*, 44 F. 2d 517 (1st Cir. 1930), cited in the majority opinion of the court below, as having been decided on jurisdictional grounds. It is on this basis that the *Harney Shoes* case has heretofore been cited. However, were the *Harney Shoes* case to have the broader significance ascribed to it by the majority of the court below, then it, too, would be in conflict with the *Dworsky* and *Hovland* cases, *supra*.

The decision of this Court in *International Bank* v. *Sherman* (1880), 101 U. S. 403, although not discussed in the majority opinion of the court below, is factually distinguished from the instant case by Judge Parkinson in his dissenting opinion. (Appendix A, *infra*, p. 23.) More-

over, the legal issue in the *International Bank* case involved a determination of when title vested in the assignee (trustee), which issue is not the same as that confronted in the instant case.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

In the United States Court of Appeals
For the Seventh Circuit.

No. 12037 September Term, 1957 September Session, 1957.

Richard E. Bixby, as Trustee in Bankruptcy of Cecil L. Slavens, Bankrupt,
Plaintiff-Appellant,
v.
First National Bank of Elwood,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

December 10, 1957

Before Lindley, Schnackenberg and Parkinson, *Circuit Judges.*

Schnackenberg, *Circuit Judge.* According to the judgment of the district court from which plaintiff, as trustee in bankruptcy of Cecil L. Slavens, bankrupt, has appealed, preferential transfers amounting to $11,519.50, made by the bankrupt to defendant on February 4th and 6th, 1954, are voidable. However, the district court refused to so adjudicate similar transfers between the same parties, amounting to not less than $26,785.50, on the ground that they were made *prior to February 3, 1954.* Plaintiff says this was error.

On April 19, 1954, an involuntary petition in bankruptcy (herein referred to sometimes as the "original petition") was filed. It alleged:

"7(a) Within four months next preceding the

filing of this Petition, the said Cecil L. Slavens committed an act of bankruptcy, in that he transferred, while insolvent, portions of his property to one or more creditors, with intent to prefer such creditors over his other creditors.

(b) That within four months next preceding the filing of this Petition, the said Cecil L. Slavens concealed, removed or permitted to be concealed or removed, a part of his property, with intent to hinder, delay or defraud his creditors or any of them, or made or suffered a transfer of part of his property, which transfer was fraudulent under the provisions of Sections 67 or 70 of the Bankruptcy act."

On April 29, 1954, Slavens filed a motion to dismiss the petition. The referee in bankruptcy on June 2, 1954 heard this motion and petitioning creditors' motion for leave to amend their petition, and he entered an order sustaining the bankrupt's contention that the aforesaid language in the petition was "defective in not specifically setting forth the acts of bankruptcy alleged". He gave leave to the petitioning creditors to file an amended petition by June 6, 1954, directing the bankrupt to plead thereto by June 16, 1954. The referee in bankruptcy further ordered that "if no Amendment to the Petition is filed on or before the 6th day of June, 1954, as herein provided for, the aforesaid Creditors' Petition shall be deemed dismissed."

No dismissal order was ever entered, because on June 3, 1954 an amended petition was filed. It alleged, *inter alia*:

"That within four months next preceding the filing of this petition, * * , Slavens committed an act of bankruptcy, in that he transferred, while insolvent, certain of his property, by executing and delivering to the First National Bank of Elwood, Indiana, on or about February 4, 1954, a Chattel Mortgage covering all of the personal property machinery and equipment in his place of business in Elwood, Indiana, for the benefit of said First National Bank of Elwood, Indiana, a creditor, for or on account of antecedent

indebtedness, the effect of which transfer will be to enable such creditor to obtain a greater percentage of its debt than some other creditor of the same class."

On October 28, 1954 Slavens was adjudicated a bankrupt. All proceedings from April through October 28, 1954 continued under the same caption and docket number in the bankruptcy court.

The amended petition set forth in specific detail divers alleged acts of bankruptcy, including that of February 4, 1954, *supra*. On June 15, 1954, Slavens filed a motion to strike and dismiss the creditors' amended petition. No ruling was made on that motion.

Plaintiff commenced this action on January 31, 1956 against defendant alleging voidable preferential transfers amounting to $61,475.15 made by the bankrupt to defendant during the period of January 25 to April 19, 1954.

Defendant filed its answer. On defendant's motion, the district court on July 27, 1956 granted a partial summary judgment in favor of defendant, holding that June 3, 1954 was the date that the petition initiating the proceedings was filed and "that only such preferential transfers made or suffered within four months before such date can be avoided * * *."

The judgment of July 27, 1956 was incorporated in the judgment appealed from.

Relevant statutory provisions are contained in the Bankruptcy Act. Section 1 (13)[1] provides:

> "'Date of bankruptcy', 'time of bankruptcy', 'commencement of proceedings', or 'bankruptcy', with reference to time, shall mean the date when the petition was filed;"

Section 60 (a)(1)[2] provides:

> "A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent

1. 11 U. S. C. A. § (13).
2. 11 U. S. C. A. § 96 (a) (1).

and within four months before the filing by or against him of the petition initiating a proceeding under this title, * * *."

Section 70[3] provides:

"(a) The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, * * *."

General Order 37 In Bankruptcy[4] provides in part:

"In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. * * *"

Rule 15 (c) of the Federal Rules of Civil Procedure,[5] provides:

"(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

It is recognized that the general rules of pleading and practice apply to proceedings in bankruptcy. 8 C.J.S. 534.

In 8 C.J.S. 533, it is said:

"The filing of a petition, sufficient on its face, by three petitioners alleging that they are creditors holding provable claims of the requisite amount, the insolvency of defendant and the commission of an act of bankruptcy within the preceding four months, gives the bankruptcy court jurisdiction of the proceeding."

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3. 11 U. S. C. A. §110.
4. 11 U. S. C. A. Rule 15 (c).
5. 28 U. S. C. A. Rule 15 (c).

And at 540, the following statement is added:

> "Under the power vested in the court by Bankruptcy Act § 30 [11 U.S.C.A. § 53 Order XI], the court, in the exercise of its sound discretion, may allow the petitioning creditors to amend an involuntary petition in bankruptcy to cure defects which are not jurisdictional, and it has been stated that such amendments are allowed with great liberality. * * *
>
> "In accordance with these rules it has been held that an amendment may be permitted to correct * * * an insufficient statement regarding the act or acts of bankruptcy relied on; * * *."

At 543 it is said:

> "*Effect of amendment.* If the amended pleading does not set up new matter or a new cause of action, it will be regarded as a continuation of the original, and will relate back so as to take effect as of the date when the original was filed, * * *. Likewise, if the original petition is sufficient on its face, that is, containing all the averments essential to its maintenance, an amendment will take effect as of the date of the original petition, provided the amendment does not involve the introduction of a new and different cause of action. * * *"

In *In re Clendon*, 73 F. 2d 876, an original petition in bankruptcy charged that the alleged bankrupt being insolvent,

> "* * * within four months next preceding the date of this petition * * * committed an act of bankruptcy, in that he did heretofore, to wit, on the 9th day of September, A.D. 1927 permit attachments to be entered in the Circuit Court of Livingston County and levied upon property of the said A. B. Clendon."

Later the petitioning creditors asked leave to amend to include allegations that "Clendon is insolvent" and also that he permitted attachments to be entered in the Circuit Court of Livingston County, Illinois, and levied upon his property and that he suffered or permitted certain creditors, which he named, with the amounts of their

respective claims, to obtain through legal proceedings commenced on a stated date in said circuit court, attachment writs which were duly issued and delivered to the sheriff and levied on real estate of Claudon, etc.

We held that the amendment was properly related back to the date of the filing of the original petition, saying, at 878:

> "This order might be questioned if the amendment set forth a new act of bankruptcy, that is, a different act from that attempted to be set forth in the original petition; but if it set forth more perfectly the same act which was attempted to be set forth in the original petition, the order that it should relate back was proper."

A convincing statement of the reasoning which should prevail in the case at bar, is contained in the First Circuit case of *Hornay Shoes, Inc.* v. *National Fabric & Finishing Co.*, 44 F. (2d) 917. There the petitioning creditors, when confronted with a motion to dismiss their petition, were given leave to amend. At 918, the court said:

> "The gist of the appellant's contention is that the court below erred in granting jurisdiction on the general allegation of preferences, without particulars as to debts, creditors, and kind of property transferred. This contention cannot be sustained.
>
> "The general allegation of preferences to persons unknown, while insufficient, was amendable, as held by the Court of Appeals in the Second Circuit in *Bradley* v. *Harrington*, 277 F. 868. The defect was not jurisdictional. If the respondent had reasonably asked for a hearing on the motion to dismiss, it might perhaps have been granted, but with leave to amend. The amendment was nothing but in the nature of a bill of particulars. It did not set up new and independent acts. *Miller* v. *Exchange Bank of Manningtree* (C.C.A.) 165 F. 752. All it did was to give greater precision to charges already reasonably made. *In re Bieler and Baier* (C.C.A.) 226 F. 78. The case falls within the principle laid down by this court in the

Harris Case, 299 F. 395, 400, where Judge Bingham said:

> "The main purpose of the Bankruptcy Act [11 USCA] is that the assets of an insolvent person, who has committed an act or acts of bankruptcy within four months before the filing of an involuntary petition against him, shall be equally distributed among his creditors. It cannot be that Congress intended that this purpose should be defeated by a mere technicality in pleading, and that petitioners, who have set forth in their petition facts constituting a sufficient ground of complaint to warrant an adjudication of bankruptcy, should not be permitted by amendment to add other facts in support of the same general ground of complaint."

The motion to dismiss the original petition in the case at bar had, as its counterpart in equity pleading, what was known as a special demurrer, which reached only formal defects such as want of certainty or in general any defects readily curable by amendment. The motion was not in the nature of a general demurrer which was directed to matters of substance. 30 C.J.S. 718, 717.

In *In re Marbell*, 75 F. 2d 979, a petitioning creditor was denied leave to amend his petition nunc pro tunc. The purpose of the amendment was to add to the statement in the original petition as to one transaction, the following phrase "said transfer and conveyance * * * being done * * * with intent to unlawfully hinder, delay and defraud your petitioner, a creditor" and to another transaction, the phrase "with intent to prefer said creditor * * * over your said petitioner, a creditor * * *." It was claimed by appellant that these phrases had been omitted from the original petition through inadvertence. At 980, this court said:

> "* * * Amendments to pleadings in all courts are therefore allowed with great liberality. * * * In the instant case, if the amendments are not allowed, then the alleged debtor will have succeeded in conveying property to the benefit of one creditor and at the ex-

pense of all his other creditors. Such a preference he may not make within four months of the filing of the petition in bankruptcy. It is the filing of the petition that stops the running of the four months. It would be a most severe penalty imposed upon all the creditors of the bankrupt, of whom petitioner is but one, if his request for amendment were denied.

* * * * *

"Likewise, the objection that the date of the execution of the mortgage was not given, finds entry in the light of the allegation that said bankrupt executed a mortgage of real estate for the sum of $40,000 'while insolvent and within four months next preceding the date of this petition.' The objection that is not the date of the execution of the mortgage, but rather that it was within four months of the date of said petition.

* * * * *

"Under all the circumstances we conclude that the court erred in the exercise of its discretion in refusing to allow the amendments."

In *In re Ellsworth*, 135 Fed. 926, at 928, we said:

"Another question suggested at the argument has relation to the jurisdiction of the court below. It is contended that because the first petition filed by the creditor was defective, and a valid amended petition was filed more than four months after the last fraudulent transfer of the property, the court had no power to permit an amendment, and was therefore without jurisdiction to entertain the proceedings. The district court had jurisdiction of the parties. It had jurisdiction of the subject-matter, viz., the general and exclusive jurisdiction of bankruptcy proceedings. The objection goes to the want of equity exhibited by the petition, not to the want of power in the court. There was jurisdiction to determine the sufficiency of the petition, and it was competent to permit any amendment. The jurisdiction in such cases comes from the statute, and is not conferred by the accuracy and precision of the averments made in the petition. *Smith v. McKay*, 161 U.S. 355, 356, 16 Sup. Ct. 490,

40 L.Ed. 731; *Blythe v. Hinckley*, 173 U.S. 501, 19 Sup. Ct. 497, 43 L. Ed. 782. And the amendment, when filed, relates to and takes effect as of the date of the filing of the original petition. *Bank v. Sherman*, 101 U.S. [illegible], 25 L.Ed. 966."

The weakness of defendant's position is emphasized by its reliance upon *In re Lowell Lumber Co.*, 209 Fed. 784, 787 to support its astonishing statement that—

"* * * But a petition is not a caveat as to prior transfers, and it would defeat the purpose of the Bankruptcy Act if petitioning creditors could file a skeleton petition in which no specific acts of bankruptcy are alleged, knowing that any subsequent amended petition will be held to relate back. For this reason the courts have refused to relate back the amended petition in such instances." (Italics supplied for emphasis.)

Defendant fails to discern that in the *Lowell* case there was no defective statement of an act of bankruptcy. Instead, there was a complete absence of an allegation of any act of bankruptcy. As the court said, at 785:

"* * * This is not a case, therefore, * * * in which a defective statement of an act of bankruptcy is made and it is sought to amend the defect by a more accurate statement. On the contrary, no cause of action to have the debtor adjudged a bankrupt is stated, or attempted to be stated, in the original petition. More than four months, in fact about eight months, after the latter the amendment is made, and (treating the amendment as sufficient) it is then for the first time that there appears on the record a cause of action authorizing the adjudication of the debtor to be a bankrupt.

"The amendment of a petition in bankruptcy is permissible, as in the case of pleadings in other actions. And it is true that, when an amendment is properly allowed and is for the same cause of action asserted in the original pleading, giving greater precision to charges already made, and does not set up

new matter or a new cause of action, the amended pleading will be regarded as a continuation of the original pleading and will relate back so as to take effect as of the date when the latter is filed. [Citing cases] This rule is of course applied to amendments of petitions in bankruptcy."

In the case at bar, we hold that the more making specific by amendment of the allegation of an act of bankruptcy contained in the original petition, even as to the statement of a new cause of action, does not constitute the making of a new petition. The amendment merely related to matters already set up in the original petition. The action in this case was not in the nature of a special statutory proceeding, attacking the sufficiency of the original petition, but was in the nature of a special statutory proceeding for the allegation of an act of bankruptcy in the petition which was not specific. The amending of the petition, therefore, in the manner of a special statutory proceeding for the purpose of [illegible] which was not specific in the petition was not the filing of a new petition. The amended petition related back to the date of the filing of the original petition and all preferences received within four months prior to the filing of the original petition were voidable and the district court erred in holding otherwise.

For these reasons, the judgment from which this appeal has been taken is reversed if it is proven that within four months prior to the filing of the original petition and not set aside by the district court. Otherwise, it is approved. This cause is remanded for further proceedings in accordance with the views herein expressed.

REVERSED AND REMANDED WITH DIRECTIONS.

Patterson, Circuit Judge, dissenting.

General Order in Bankruptcy 36 provides that the several forms annexed to the general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case. Official Form No. 1 is that of a creditors' petition with numbered paragraphs 1 through 4, as follows:

"Within four months next preceding the filing of this petition, the said _____ committed an act of bankruptcy, in that he did heretofore, to-wit, on the _____ day of _____, 19____,

_____

_____"

I believe that petitioning creditors cannot completely ignore the mandate of that Order. I also believe it to be the law that an involuntary bankruptcy petition alleging in the language of [illegible] any specification of any of the [illegible] that the purported [illegible] intended to prefer creditors [illegible] is amended to specify some [illegible] the date of the [illegible] from which the four months [illegible] *In re Coulson*, 1 Cir., [illegible] *Farmers' State Bank*, 3 Cir., [illegible] *In re Fuller*, 2 Cir., 1926, 15 F. 2d [illegible] 2 Cir., 1933, 66 F. 2d 878; *Dwyer v. Chicago Title & Trust Company*, 2 Cir., 1936, 85 F. 2d [illegible].

The cases [illegible] are, in my opinion, inapposite. [illegible] amendment [illegible] Since the amendment [illegible] jurisdiction [illegible] petition [illegible] to state [illegible] in no [illegible] jurisdiction [illegible] the filing of the amended petition, however, did question have in whether the four months period under Section 60a of the Bankruptcy

Act shall be calculated from the filing date of the original petition, which was ineffectual, or from that of the amended petition, which was valid. The statement by this court in *Shoemaker* that [illegible] relating back to the filing of the [illegible] was dictum.

In *Cheatham* the original petition did allege a specific act of bankruptcy in that it [illegible] committed an act of bankruptcy in that he [illegible] on the 5th day of [illegible] petition to be entered [illegible] Sunday and [illegible] the same act of bankruptcy. The amended petition omitted this act of bankruptcy. [illegible] and this court held [illegible] relation back. I agree with these decisions but they are not dispositive of the question in the case at bar.

I also agree that Rule 15(c) of the Federal Rules of Civil Procedure, 28 U.S.C.A., should be liberally construed but there is a point beyond which this liberality cannot be extended. Before the doctrine of relation back can have [illegible] there must appear [illegible] plaintiff [illegible] plead [illegible] tion [illegible] imperfection [illegible] In this case the petition [illegible] did not know of any [illegible] preferences at the time [illegible] 19, 1954, and did not learn the [illegible] of the bankrupt long afterwards. It was [illegible] entered his motion for leave to file an amended petition. The record [illegible] "shotgun" [illegible] tense of [illegible] attempted to set forth the same act of bankruptcy alleged in the amended petition. Under such a record as here there can be no relation back.

In the case of *Donnelly v. Akeroyd Steel Bonding Corporation*, 2 Cir., 1950, 183 F. 2d 868, the Second Circuit had before it the question of relation back under facts

similar to those here in controversy and that court held that the amended petition did not relate back because to so hold would amount to amending Section 3 sub. b of the Bankruptcy Act. In so doing it pointed out that it had earlier held the doctrine of relation back would apply only where there was a showing that the petition knew and in his original petition "had attempted to state some definite conduct, transaction or occurrence" complained of. The record here patently shows no such attempt was made.

In the case of *International Bank v. Sherman*, 1939, 101 U. S. 403, the alleged bankrupt transferred some of his assets after the original petition was filed and the court held that the filing of the original petition was a caveat to all the world and those who dealt with the property of the alleged bankrupt between the filing of the petition and adjudication of bankruptcy did so at their peril. The court further held that the amendment of the original petition related back and title vested in the assignee as of the date of the filing of the original petition but in that case there is no indication that the original petition was simply a skeleton or blank petition in the general language of the Act and that the amended petition was the only petition which was a valid one, as is the case here. Also in that case the original petition was in nowise either dismissed or abandoned, but here the motion of the alleged bankrupt to dismiss the original petition was sustained and the original petition did not initiate the proceedings. The District Court so concluded when it held that the amended petition filed on June 2, 1954 was the petition initiating the proceedings under Section 60a of the Act.

I regret to disagree with the majority but the record before this court affirmatively shows that the facts alleged in the amended petition were unknown to the petitioning creditors when they filed the original petition. The amended petition therefore relied upon an act of bankruptcy not alleged in the original petition. I believe the District Court was correct in concluding that the amended petition filed on June 2, 1954 was the petition initiating the proceedings under Section 60a of the Bankruptcy Act. I would affirm.

APPENDIX B.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago 10, Illinois.

Tuesday, December 10, 1957.

Before

Hon. Walter C. Lindley, Circuit Judge.
Hon. Elmer J. Schnackenberg, Circuit Judge.
Hon. W. Lynn Parkinson, Circuit Judge.

RICHARD E. BIXBY, as Trustee in Bankruptcy of Cecil L. Slavens, Bankrupt,
Plaintiff-Appellant,

No. 12037 *vs.*

FIRST NATIONAL BANK OF ELWOOD,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Indiana, Indianapolis Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, REVERSED as to preferences made within four months prior to the filing of the original petition and not set aside by the Judgment of the District Court. Otherwise the said Judgment of the said District Court is approved.

It is further ordered and adjudged by this Court that this cause be REMANDED to the said District Court for further proceedings in accordance with the views expressed in the Opinion of this Court filed this day.

It is further ordered that the costs of this appeal be taxed against Defendant-Appellee.

APPENDIX C.

UNITED STATES DISTRICT COURT,

Southern District of Indiana,

Indianapolis Division.

RICHARD E. BIXBY, Trustee in Bankruptcy of Cecil L. Slavens, Bankrupt,

vs.

FIRST NATIONAL BANK OF ELWOOD.

No. IP 56-C-16.

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(Filed U. S. District Court Mar. 5, 1957.
Robert G. Newbold, Clerk.)

The above entitled cause came on regularly for trial before the court without a jury, and the court having duly considered the evidence and being fully advised in the premises now finds the following:

FINDINGS OF FACT.

1. Plaintiff's Complaint is brought under the provisions of Section 60(b) of the Act of Congress Relating to Bankruptcy and is for recovery of the value of alleged preferential transfers made by the bankrupt, Cevil L. Slavens, to the Defendant, First National Bank of Elwood at various dates from January 25, 1954, to April 19, 1954.

2. On April 19, 1954, a petitioning creditor filed an involuntary petition in bankruptcy against Cecil L. Slavens in the United States District Court for the Southern Dis-

trict of Indiana, Indianapolis Division, in which the following acts of bankrupty were alleged in paragraph 7 thereof:

"7(a) Within four months next preceding the filing of this Petition, the said Cecil L. Slavens committed an act of bankruptcy, in that he transferred, while insolvent, portions of his property to one of more creditors, with intent to prefer such creditors over his other creditors.

"7(b) That within four months next preceding the filing of this Petition, the said Cecil L. Slavens concealed, removed or permitted to be concealed or removed, a part of his property with intent to hinder, delay or defraud his creditors or any of them, or made or suffered a transfer of part of his property which transfer was fraudulent under the provisions of Section 67 or 70 of the Bankruptcy Act."

3. On April 29, 1954, the alleged bankrupt, Cecil L. Slavens, filed a Motion to Dismiss Petition.

4. On May 28, 1954, the petitioning creditors filed a Motion for Leave to Amend Involuntary Petition and annexed thereto a Proposed Amended Petition.

5. On June 1, 1954, the Referee in Bankruptcy entered an Order granting the petitioning creditors leave to file and serve an amended petition on or before June 6, 1954.

6. On June 2, 1954, the Referee in Bankruptcy entered an Order sustaining the alleged bankrupt's Motion to Dismiss Petition on the ground that Paragraphs 7(a) and 7(b) of the Creditors' Petition of April 19, 1954, were "defective in not specifically setting forth the acts of bankruptcy alleged."

7. On June 3, 1954, the petitioning creditors filed a Creditors' Amended Petition, which was not the same as the Proposed Amended Petition annexed to the Motion for Leave to Amend Involuntary Petition filed May 28, 1954. In Paragraphs 6(a-k) of said Creditors' Amended

Petition were alleged preferential transfers and fraudulent transfers as acts of bankruptcy.

8. On June 15, 1954, the alleged bankrupt filed a Motion to Strike and Motion to Dismiss the Creditors' Amended Petition.

9. On October 27, 1954, the alleged bankrupt and all of the petitioning creditors entered into a written stipulation wherein it was agreed to amend the Creditors' Amended Petition by striking all of paragraph 6 of said amended petition with the exception of paragraph 6a, and it was further agreed "that the alleged bankrupt herewith denies all of the allegations set forth in said creditors amended petition, but admits herein his insolvency and inability to pay his debts as they mature."

10. On October 28, 1954, the Referee in Bankruptcy entered an order adjudging Cecil L. Slavens a bankrupt.

11. Richard E. Bixby was duly appointed Trustee of the aforesaid bankrupt, and duly qualified, and was and is now acting as such Trustee.

12. The First National Bank of Elwood, the Defendant herein, is a national banking institution with its principal and only banking office located in Elwood, Indiana, and is a member of the Federal Reserve System.

13. The action herein was begun on January 31, 1956. This court has jurisdiction under the provisions of Section 60(b) of the Act of Congress relating to Bankruptcy. (11 U. S. C. Sec. 96)

14. On February 3, 1954, Cecil L. Slavens was indebted to the Defendant in the sum of $43,419.36.

15. On February 4, 1954, the said Cecil L. Slavens transferred a portion of his property consisting of the sum of $2,905.85 to the Defendant.

16. On February 6, 1954, Cecil L. Slavens transferred

a portion of his property consisting of the sum of $8,613.65 to the Defendant.

17. That the aforesaid transfers in the sum of $11,519.50 were in payment of, and in reduction of, the then existing and antecedent indebtedness owing by Cecil L. Slavens to the Defendant.

18. That on the dates of the above transfers set forth in Paragraphs 8, 9 and 19 herein, the said Cecil L. Slavens was insolvent in that the aggregate of his property at a fair valuation was insufficient in amount to pay his debts.

19. The effect of said transfers was to enable the Defendant to obtain a greater percentage of its debt than some other creditor of the said bankrupt, Cecil L. Slavens, of the same class.

20. That at the time of the aforesaid transfers, the said Defendant had reasonable cause to believe that said bankrupt, Cecil L. Slavens, was insolvent.

21. That the aforesaid transfers were made as part of a scheme or device to pay the bankrupt's indebtedness to the Defendant while insolvent.

22. The aforesaid transfers were effected by the acceptance of deposits by the Defendant from the bankrupt, which deposits were not received in good faith and which deposits were not received in the regular course of business.

Conclusions of Law.

1. This court has jurisdiction of the subject matter and the parties.

2. That June 3, 1954, is fixed as the date of the filing of the petition initiating the proceedings under the Bankruptcy Act against Cecil L. Slavens.

3. That all transfers made by the bankrupt, Cecil L.

Stevens, on or before February 3, 1954, are not preferences within the meaning of the Bankruptcy Act.

4. That the Trustee has sustained the burden of proof that the payment and transfers of $11,519.50 by the bankrupt to the Defendant were preferences as defined in Section 60(a) of the Bankruptcy Act.

5. That the Trustee has sustained the burden of proof that the preferential transfers in the sum of $11,519.50 were voidable as set forth under Section 60(b) of the Bankruptcy Act.

6. That the Defendant did not have the right of set-off against deposits made by the bankrupt and received by the Defendant.

7. That the transfers suffered, and the deposits made, by the bankrupt were not accepted by the Defendant in good faith and in the ordinary course of business, and the defense of set-off is not applicable.

8. The Trustee is entitled to judgment against the First National Bank of Elwood in the sum of $11,519.50, plus interest at the rate of six per cent (6%) per annum from January 31, 1956.

Let judgment be entered accordingly.

Dated this 5th day of March, 1957.

CALE J. HOLDEN,
District Judge.

UNITED STATES DISTRICT COURT,

Southern District of Indiana,

Indianapolis Division.

RICHARD E. BIXBY, as Trustee in Bankruptcy of Cecil L. Slavens, Bankrupt,

vs.

FIRST NATIONAL BANK OF ELWOOD.

No. IP 56-C-16

ENTRY OF JUDGMENT.

The above-entitled action came on for trial before the court, without a jury, on February 26, 1957; the Plaintiff appearing by his attorneys, Sigmund J. Beck and Alan I. Klineman, of Bamberger & Feibleman, and the Defendant appearing by its attorneys, Keith W. Tyler and Henry C. Ryder, of Buschmann, Krieg, DeVault & Alexander, and testimony having been offered and the court having filed its Findings of Fact, Conclusions of Law, and Order for Judgment, now, pursuant to said Order for Judgment, it is hereby

ORDERED AND ADJUDGED, That the Plaintiff, Richard E. Bixby, as Trustee in Bankruptcy of Cecil L. Slavens, Bankrupt, have judgment against the Defendant, First National Bank of Elwood, in the sum of Eleven Thousand Five Hundred Nineteen Dollars and Fifty Cents ($11,519.50), together with interest thereon at the rate of six per cent (6%) per annum from January 31, 1956, to the date of this judgment, and for his costs and disbursements in this action.

Dated March 5, 1957.

CALE J. HOLDEN,
United States District Judge.

APPENDIX D.

Section 1 (13) of the Bankruptcy Act, 30 Stat. 430, 11 U. S. C., §1 (13):

"(13) 'Date of bankruptcy', 'time of bankruptcy', 'commencement of proceedings', or 'bankruptcy', with reference to time, shall mean the date when the petition was filed;"

Section 3 (b) of the Bankruptcy Act, 52 Stat. 871, 11 U. S. C., §21 (b):

"b. A petition may be filed against a person within four months after commission of an act of bankruptcy. Such time [illegible] with respect to the commission of such [illegible] shall not expire until four months after the date when the [illegible] provided in paragraph [illegible] of section 59 of this Act, [illegible]"

Section 39 (c) of the Bankruptcy Act, 52 Stat. 880, 11 U. S. C. §75 (c):

"c. The trustee of the estate of a bankrupt and his successors or successors, if any, upon his or their appointment and qualification, shall be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, [illegible]"

General Order in Bankruptcy No. 37, 11 U. S. C. Following §53, 52 Stat. 875:

"37. General Provisions. In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall be followed insofar as they are [illegible] and may be modified by the general orders. In addition, the referee may, [illegible] the court may [illegible] the provisions of these [illegible] as to expedite business, and may otherwise prescribe the rules for the preparation or hearing of any particular proceeding."

General Order in Bankruptcy No. 38, 11 U. S. C. Following §53, 30 Stat. 554:

"38. Forms. The several forms annexed to these general orders shall be observed and used, with such alterations as may be necessary to suit the circumstances of any particular case."

Official Bankruptcy Form No. 5 (Creditors' Petition):

"* * * 4. Within four months next preceding the filing of this petition, the said _____ committed an act of bankruptcy, in that he did heretofore, to wit, on the ____ day of _____, 19__, _____ _____"

Rule 15 (c) of the Federal Rules of Civil Procedure, 28 U. S. C. Rule 15 (c):

"(c) Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."